

Appendix H

Appendix H

Clark Fork Water Rights Description and Use

I. Water Rights in the Mill Creek and Willow Creek Drainages.

AR's ownership interest in each of the following water rights in the Mill and Willow Creek Drainages will be transferred to the State by deed no later than three years following the Effective Date and subject only to AR's reservations described in this Section I, as provided in Subparagraph 72.b.i of the Consent Decree.

Willow Creek Drainage	Mill Creek Drainage
A. Willow Creek 76G-W-127612 76G-W-127610 76G-W-127611 76G-W-127613 76G-W-127614	A. Mill Creek 76G-W-032391 76G-W-032373 76G-W-032374 76G-W-032369 76G-W-032387 76G-W-032385 76G-W-032372 76G-W-032383 76G-W-032375 76G-W-127642 76G-W-127631 76G-W-127617 76G-W-127616 76G-W-127635 76G-W-127620 76G-W-127630
B. Unnamed Tributary to Willow Creek 76-W-127633	B. Unnamed Tributary to Mill Creek 76G-W-127618
	C. Clear Creek 76G-W-127639 76G-W-127640 76G-W-032370
	D. Joyner Creek 76G-W-127646

Reservations: The Mill Creek and Willow Creek drainages water rights are subject to the following reservations which are reflected in the deed for conveyance of the Section I water rights:

1. AR shall have the right to consume as much of the Mill Creek and Willow Creek water and water supply as may be reasonably required to satisfy any response action or restoration requirement that may apply now or hereafter to AR for the ARWW&S Operable Unit, the Old Works/East Anaconda Area Operable Unit and the Warm Springs Ponds Active Area and Inactive Area Operable Units;
2. AR shall have the right to divert so much of the water as may be reasonably required to satisfy any response action or restoration requirement that may apply now or hereafter to AR for the ARWW&S OU, the Old Works/East Anaconda Area Operable Unit and the Warm Springs Ponds Active Area and Inactive Area Operable Units, so long as the waters so diverted are returned to Mill Creek and/or Willow Creek, as the case may be, at the highest practicable point of discharge under gravity flow;
3. Where the underlying water use does not require a water use permit from the Montana Department of Natural Resources and Conservation ("DNRC") pursuant to the provisions of MCA 85-2-301 et seq., AR shall have the right to divert, pump, capture and/or use any groundwater, defined as water underneath the surface of the ground, regardless of whether such groundwater would otherwise flow into any surface stream or other surface water source or induce any discharge from any surface stream or other surface water source, if and to the extent that the diverting, pumping, capturing and/or use of such groundwater is deemed expedient or convenient by AR to: (1) create, restore, and/or enhance any wetland or wetland environment arising from any Upper Clark Fork River Basin response action or restoration requirement; and/or (2) to satisfy any other response action or restoration requirement for the ARWW&S Operable Unit, the Old Works/East Anaconda Area Operable Unit and the Warm Springs Ponds Active Area and Inactive Area Operable Units that may apply now or hereafter to AR; and
4. Where the underlying water use does require a water use permit from DNRC pursuant to the provisions of MCA 85-2-301 et seq., AR shall have the right to divert, pump, capture and/or use any groundwater in the event that DNRC confirms or issues a water use permit for such use, and the State shall not object to the issuance of any such water use permit, and shall not otherwise exercise any water rights not used by AR under the reservations set forth in this Section I or Section II in any way that results in a curtailment of any diversions under that permit, if and to the extent that the diverting, pumping, capturing and/or use of such groundwater is deemed expedient or convenient by AR to: (1) create, restore, and/or enhance any wetland or wetland environment arising from any Upper Clark Fork River Basin response action or restoration requirement; and/or (2) to satisfy any other response action or restoration requirement for the ARWW&S Operable Unit, the Old Works/East Anaconda Area Operable Unit and the Warm Springs Ponds Active Area and Inactive Area Operable Units that may apply now or hereafter to AR.

Transfer of reserved rights: AR shall transfer by quitclaim deed its reserved interests in the Section I water rights to the State when AR's use of said water right(s) for any response action purpose or restoration requirement is no longer necessary, and the response action purpose or restoration requirement for which a water right is required is satisfied or extinguished, including completion of any operation and maintenance activity for which a water right is required.

DNRC Proceedings: It is recognized that before the Section I water rights may be used for instream flow or Remedy, changes in point of diversion, alternate use, and alternate place of use must be approved by DNRC, and DNRC may or will qualify its approval with terms and conditions. As described in Section III below, AR will assist, cooperate and support the State in making and advancing any necessary change applications. AR will be a co-applicant with the State in any administrative change proceedings related to the alternate use of the Section I water rights for instream flow or other Restoration or Remedy that is filed prior to transfer of the Section I water rights to the State. Following transfer of the Section I water rights to the State subject to AR's reserved interest, AR may elect to participate as a co-applicant in any change application for DNRC approval of the alternate use of the Section I water rights for instream flow or other Restoration or Remedy. Upon transfer of AR's reserved interest in the Section I water rights to the State, the State shall become the sole owner of the Section I water rights and thereafter be the sole applicant in any administrative change proceeding regarding the ownership interest of the Section I water rights.

II. Water Rights in the Warm Springs Creek, Dutchman Creek and Lost Creek Drainages.

AR's ownership interest in each of the following water rights in the Warm Springs Creek, Dutchman Creek and Lost Creek drainages shall be transferred to the State by deed no later than three years following the Effective Date of this Consent Decree, subject only to the conditions set forth in Subparagraph 72. b.ii of the Consent Decree, which are (1) finalization of an agreement or agreements between AR and the Montana Department of Fish, Wildlife and Parks ("FWP") as referenced in Subparagraph 72.b.ii of the Consent Decree; (2) all applicable existing subordinations, covenants and other limitations; and (3) AR's reservations of interest. These reservations are further described below in this Section II of this Appendix H.

76G-W-032342 (the remaining 1.25 cfs)	76G-W-126464	76G-W-126511	76G-W-T126551
	76G-W-126469	76G-W-126513	76G-W-126552
	76G-W-126470	76G-W-126514	76G-W-126553
76-G-W-032343	76G-W-126471	76G-W-126515	76G-W-126554
76G-W-032344	76G-W-126472	76G-W-126516	76G-W-126555
76G-W-032346	76G-W-126473	76G-W-126517	76G-W-126559
76G-W-032347	76G-W-126475	76G-W-126518	76G-W-126565
76G-W-032348	76G-W-126476	76G-W-126519	76G-W-126566
76G-W-032349	76G-W-126477	76G-W-126520	76G-W-126568
76G-W-032350	76G-W-126478	76G-W-126521	76G-W-T126569
(the remaining 1.25 cfs)	76G-W-126479	76G-W-126523	76G-W-126570
	76G-W-126481	76G-W-126524	76G-W-126572

76G-W-032351	76G-W-126486	76G-W-126527	76G-W-126573
76G-W-032353	76G-W-126487	76G-W-126536	76G-W-126636
76G-W-032354	76G-W-126490	76G-W-T126537	76G-W-127602
76G-W-032355	76G-W-126493	76G-W-126538	76G-W-127603
76G-W-032357	76G-W-126496	76G-W-126539	76G-W-127608
76G-W-032358	76G-W-126497	76G-W-126541	76G-W-127609
76G-W-032360	76G-W-126498	76G-W-T126542	76G-W-91199
76G-W-032362	76G-W-126499	76G-W-126544	76G-W-91206
76G-W-032363	76G-W-126500	76G-W-126545	76G-W-91207
76G-W-032364	76G-W-126502	76G-W-126546	76G-W-91212
76G-W-032365	76G-W-126503	76G-W-126547	75G-W-91230
76G-W-032366	76G-W-126506	76G-W-126548	75G-W-91231
76G-W-032392	76G-W-126507	76G-W-126549	76G-P-074211
76G-W-032393	76G-W-126510	76G-W-126550	
76G-W-126455			
76G-W-126460			

Reservations: The Warm Springs Creek, Dutchman Creek and Lost Creek drainages water rights are subject to the following reservations and limitations which are reflected in the deed for conveyance of the Section II water rights:

1. AR shall have the right to consume up to five (5) cfs of the Warm Springs Creek water and water supply as may be reasonably required to satisfy any response action or restoration requirement that may apply now or hereafter to AR;
2. AR shall have the right to divert so much of the water as may be reasonably required to satisfy any response action or restoration requirement that may apply now or hereafter to AR, so long as the waters so diverted are returned to Warm Springs Creek at the highest practicable point of discharge under gravity flow and as so long as the diversion of such waters does not result in flows less than 40 cfs in Warm Springs Creek, as measured at USGS Gage No. 12323760 and USGS Gage No. 123237770 on Warm Springs Creek;
3. Where the underlying water use does not require a water use permit from the DNRC pursuant to the provisions of MCA 85-2-301 et seq. AR shall have the right to divert, pump, capture and/or use any groundwater, defined as water underneath surface of the ground, regardless of whether such groundwater would otherwise flow into any surface stream or other surface water source or induce any discharge from any surface stream or other surface water source, if and to the extent that the diverting, pumping, capturing and/or use of such groundwater is deemed expedient or convenient by AR to: (1) create, restore, and/or enhance any wetland or wetland environment arising from a Upper Clark Fork River Basin response action or restoration requirement; and/or (2) to satisfy any other response action or restoration requirement that may apply now or hereafter to AR; and

4. Provided that the total amount of the water and water supply consumed by AR pursuant to the rights reserved under this Section II do not exceed 5 cfs, where the underlying water use does require a water use permit from DNRC pursuant to the provisions of MCA 85-2-301 et seq., AR shall have the right to divert, pump, capture and/or use any groundwater in the event that DNRC confirms or issues a water use permit for such use, and the State shall not object to the issuance of any such water use permit, and shall not otherwise exercise any water rights not used by AR under the reservations set forth in Section I or this Section II in any way that results in a curtailment of any diversions under that permit, if and to the extent that the diverting, pumping, capturing and/or use of such groundwater is deemed expedient or convenient by AR to: (1) create, restore, and/or enhance any wetland or wetland environment arising from any Upper Clark Fork River Basin response action or restoration requirement; and/or (2) to satisfy any other response action or restoration requirement that may apply now or hereafter to AR.

In the event that any response action or restoration requirement may hereafter apply to AR that reasonably requires diversions and/or water uses that would otherwise violate any term of this reservation, FWP agrees to enter into good faith negotiations with AR, as the case may be, to provide a quantity of water sufficient to fulfill any such requirement without payment of any rentals or other payments in the nature of rentals for any use of the waters or water rights accorded FWP from the Warm Springs Creek, Dutchman Creek, and Lost Creek drainages in a way that preserves the benefits of the instream flow provided by the Warm Springs Creek, Dutchman Creek, and Lost Creek drainages water rights.

Transfer of reserved rights: AR shall transfer to the State by quitclaim deed its reserved interests in the Section II water rights to the State when AR's use of said water right(s) for any response action purpose or restoration requirement is no longer necessary, and the response action purpose or restoration requirement for which a water right is required is satisfied or extinguished, including completion of any operation and maintenance activity for which a water right is required.

Existing subordinations, covenants and other limitations: All water and water supply available through the Section II water rights described above are subject to all applicable existing subordinations, covenants and other limitations set forth in:

- (1) that certain Amended Memorandum of Agreement dated November 22, 1996 by and between the City and County of Butte-Silver Bow, Montana Resources, Montana Resources, Inc., Jess Eighorn and Ueland Ranches, Inc.;
- (2) that certain Special Warranty Deed dated December 31, 1996 by and between Ueland Ranches, Inc., Jess Eighorn and Atlantic Richfield Company;
- (3) that certain Agreement dated June 23, 1999 by and between Robert H. Johnson for RSN Johnson Ranches L.L.C., Raymond H. Johnson, attorney-in-fact for Sadie Johnson, Jess Eighorn and Ueland Ranches;

(4) that certain Water Right Lease Agreement dated October 7, 2004 by and between Grantor and Ueland Ranches, Inc.; and

(5) the (draft) Ditch Agreement regarding use of the Section II water rights (at a rate not to exceed 8 cfs) to account for and satisfy Gardiner Ditch seepage losses that result from delivery of Eighorn's water rights to the historic place of use of the Eighorn water rights, to be executed by and between ARCO Environmental Remediation LLC, Jess Eighorn and his Successors-in-Interest (as finalized and executed by said parties), with the State's concurrence upon its terms prior to execution by the parties, which concurrence shall not be unreasonably withheld.

DNRC Proceedings: It is recognized that before the Section II water rights may be used for instream flow or Remedy, any change in point of diversion, alternate use, and alternate place of use must be approved by DNRC, and DNRC may or will qualify its approval with terms and conditions. As described in Section III below, AR will assist, cooperate and support the State in making and advancing any necessary change applications. AR will be a co-applicant with the State in any administrative change proceedings related to the alternate use of the Section II water rights for instream flow or other Restoration or Remedy filed prior to transfer of the Section II water rights to the State. Following transfer of AR's interests to the State, if the conditions set forth in Paragraph 72.b.ii are satisfied, and until AR transfers its reserved interests in the Section II water rights, AR may elect to participate as a co-applicant with the State in the administrative change proceedings for the water rights and shall bear all costs for its participation related to its reserved interests. Upon transfer of AR's reserved interest in the Section II water rights to the State, the State shall become the sole owner of the Section II water rights and thereafter shall be the sole applicant in any administrative change proceeding regarding the ownership interest of the Section II water rights.

Should the final agreement or agreements between AR and FWP required by Subparagraph 72.b.ii of this Consent Decree not be achieved by three years following the Effective Date, the deed for the Section II water rights in escrow shall be delivered to AR and AR shall retain all of its ownership interest in the Section II water rights.

III. Use of Water and Cooperation with AR.

It is the expectation of the Parties that the conditions for transfer of AR's ownership interest in each of the water rights described in this Appendix H will be satisfied and the water rights will transfer to the State, as described above. The State intends to obtain the administrative approvals necessary to use all of AR's ownership interest in the water rights listed in this Appendix H for instream flow subject to (i) the water needed for Remedy, as set forth in Subparagraph 72.b.iii and 72.d of the Consent Decree, and as further described in Section IV of this Appendix H; and (ii) satisfaction of the conditions and AR's reservations set forth in Subparagraphs 72.b.i and 72.b.ii of the Consent Decree, and as further described in Section I and II of this Appendix H; and for (i) and (ii), only for the time periods specified in Subparagraph 72.b.iii of the Consent Decree and this Appendix H.

In any change application for an alternate use of the Section I and / or the Section II water rights filed prior to AR transfer of its reserved interests such water rights, the State will preserve the original use of the Section I and II water rights and seek DNRC approval of an alternate use of such water rights for instream flow, other Restoration or Remedy. AR shall have the obligation to obtain any future administrative approvals for its use of any Section I and / or Section II water right (in which AR has a reserved interest) for a response action or restoration purpose, and the State agrees to cooperate with AR and support any such approvals sought by AR following conveyance of the AR water rights to the State, as described in Sections I and II above. In pursuing approval of response action or restoration uses as part of any such future change application, AR is responsible for development and presentation of all evidence in any administrative proceeding to support the alternate use of any Section I and / or Section II water rights for response action or restoration purposes, and will bear all costs for same.

Upon transfer of ownership of any water right to the State and except as limited by AR's reserved interests and right to seek future DNRC approvals under Sections I and II, the State may use any of the water not required to satisfy any AR reserved interest or to satisfy any demand that arises from Remedy implementation for other State Restoration purposes or for any other public purpose at the State's discretion.

The State, by and through FWP, and AR as co-applicant, under the circumstances described in Section I and II above, will file and pursue changes of diversion, use, and place of use applications with DNRC. AR and the State will each bear their own costs in preparing and pursuing such change applications, and generally in their commitment to cooperate under this Section III. FWP will draft the change applications with the help and assistance of AR. FWP will make all strategic, legal, and policy decisions necessary for the applications and for any hearings on the applications before DNRC. AR will provide technical and legal assistance. AR will make available to FWP all existing data, analysis, reports and any other documentation of the water rights that AR has developed or possesses in support of the change process. This will include historic use, the present use, the return flows, the priority, the water availability in the drainages, and other information necessary and helpful in making and supporting the change applications. AR will make available its personnel (including its water lawyers and contractors) to explain and support the data, analysis, reports, and other documentation, to assist in developing the change applications. AR will permit the State to engage at its expense any AR contractor to provide fact and expert witness testimony during any administrative contested case hearings on the change applications before DNRC, and AR employees will cooperate in providing fact testimony in any administrative proceeding. AR will assist and consult with FWP on any legal issues and strategies involving change applications. AR will also consult with FWP about AR's contacts with other water users.

The instream flow rights will be held for the State by FWP pursuant to its authority to hold water rights for instream flow purposes under MCA §85-2-436. The water for Remedy will be separately described in or will be the subject of a separate change application, and the changed water rights for Remedy will be held for the State by the Montana Department of Environmental Quality ("DEQ"). The water rights designated by the parties for Remedy are further described in Section IV of this Appendix H. When water is no longer required for Remedy, the water rights for Remedy, if the conditions set forth in Paragraph 72.b.ii are

satisfied, will then be the property of the State, through FWP, and used by the State for instream flow purposes under the changes authorized by DNRC.

IV. Water Rights for Remedy and Specific Remedy Water Usage Commitments

As contemplated in Subparagraph 72.b.iii of the Consent Decree, the water rights identified below (Warm Springs Creek drainage) have been designated by the Parties to be among the rights available for use in implementation of the Remedy.

The Parties believe the water rights identified for Remedy are sufficient to meet the Remedy obligations described in this Section IV. The Parties further agree that exercise of AR's reserved interest in any water rights described in Sections I and II will not limit or impair provision of a sufficient supply to meet the Remedy obligations, as AR's reserved interest shall apply only to those water rights not changed and used for Remedy purposes. Notwithstanding the applicability of AR's reservations to the water rights designated for Remedy as listed in the special warranty deed for transfer of the Section II water rights, AR's reserved interests in water rights designated for Remedy shall not apply to or limit in any manner the use of the water supply from these water rights or other water rights now or later designated by the Parties to satisfy the Remedy obligations.

The State may not use the designation of water rights for Remedy purposes pursuant to this Section IV as a basis for objection to any AR application to DNRC involving AR's reserved rights set forth in Sections I and II, provided however, that any AR requested changes shall not in any way impair or prevent the use of the Remedy rights for Remedy purposes. Any water right that is designated, but not used for Remedy purposes shall be subject to Section I or Section II reservations, as applicable. The State's agreement that it will not object to any application filed by AR for approval of a change of water rights pursuant to AR's reserved interest in any water rights as set forth in this paragraph shall be binding upon transferees, successors and assigns, if any, of the State's ownership interest in the Remedy water rights.

Warm Springs Creek Drainage	
1.	1.25 cfs out of 76G-032342
2.	1.25 cfs out of 76G-032350
3.	76G-032392
4.	76G-126569
5.	0.75 cfs out of 76G-126515

Within six months of the Effective Date, the State and AR as co-applicants anticipate filing a change application to confirm an alternative point(s) of diversion and place(s) of use for the amount of water necessary for Remedy from among the water rights listed in this Section IV, or an alternative or supplemental water right to that set forth above, which is of sufficiently senior priority and is sufficient for flow rate, acreage, and amount, to provide a full water supply to up to 150 acres each year at the Remediation Sites for the entire irrigation season from May 15

through October 15 of each year for the duration of the Remedial Action, plus two years. The specific locations of the revegetation ("Remediation Sites") are outlined in the ROD and will be further defined in the Remedial Design process. For example, as part of its implementation of the Remedy, the State will revegetate and stabilize the banks of the Clark Fork River, and may irrigate revegetated tracts until the plant communities are established and self-supporting. The revegetation will consist of planting willow and other native plant species, and will occur within a 50-foot riparian buffer zone along approximately 43 miles of the Clark Fork River, encompassing approximately 472 acres. It is anticipated that the willows and other plants may require irrigation for approximately 3-5 years at each Remediation Site, and no more than 150 acres are expected to be under irrigation at the Remediation Sites in any one year. The designated Remedy water rights are sufficient to provide for a total of at least 510 acre feet per year of water for the duration of the Remedial Action, plus two years (estimated at 14 years in Attachment 1), as further quantified and explained in Attachment 1, Water Requirements for Irrigation of the Streambank Riparian Buffer Zone.

As set forth in Section III, the State, by and through FWP, with AR as co-applicant as described above, may file and pursue other changes of point of diversion, alternate use, and alternate place of use applications with DNRC. The State will notify EPA of any such filings during Remedial Action plus an additional two years. The changed water rights for Remedy will be held for the State by the Montana Department of Environmental Quality ("DEQ"). FWP and AR expect to file an application to obtain a transitory right for the water for Remedy.

The Parties anticipate that the water right(s) designated for Remedy water usage will subsequently be used for instream flow purposes. The application for change of the water rights for Remedy purposes will preserve the original point of diversion, use and place of use, and also likely include provision for Restoration irrigation, and for subsequent instream use when Remedy usage is no longer required. In addition, to the extent any water rights changed for Remedy purposes are not used for Remedy in any year, or are only partially consumed for Remedy purposes in any year, the water rights or the unneeded portion of the water rights will be used for Restoration irrigation and instream flow purposes by the State, as authorized by DNRC.

As set forth in Subparagraph 72.d of the Consent Decree, should EPA and DEQ determine that the specific water rights changed for Remedy purposes, as determined in any required state administrative proceeding, do not sufficiently provide an adequate water supply for the Remedy, the State shall provide EPA and DEQ with additional water rights from its water rights described in this Appendix H.

As set forth in Subparagraph 72.d of the Consent Decree, should EPA and DEQ determine, in review of any determination made in a required state administrative proceeding, that the Appendix H water rights available to the State do not sufficiently provide an adequate water supply for the Remedy, AR shall provide DEQ with additional water supplies adequate for Remedy, as determined by EPA and DEQ. Should AR be required under Subparagraph 72.d of the Consent Decree to provide additional water supplies, AR may meet the demand for additional water supplies, in whole or in part, by lease of AR's ownership interest in any water rights previously approved by DNRC for Remedy use. Such lease would be without cost to the State and the lease would terminate upon completion of Remedy.

V. AR's Conveyance of Water Rights to the State

AR and the State have agreed upon the form of two special warranty deeds for transfer of the water rights identified in Section I and Section II, respectively, under the terms and conditions described in this Appendix H. The deeds have been placed in escrow and will be distributed under the terms of the Escrow Agreement executed by AR and the State.

In the event additional water rights are designated for Remedy, under the Section IV provisions, the Parties will revise this Appendix H accordingly to reflect any such change that follows lodging of the Consent Decree.

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